

Governor's Work Group on Commercial Access to Government Electronic Records

COMMERCIAL ACCESS TO PUBLIC INFORMATION

A Staff Overview Of Selected State And Federal Policies

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Changes in technology and in the potential commercial value of public records are creating new challenges for policymakers in every state and the federal government. All 50 states have in recent years adjusted the definition of "public record" to include electronic media. States are confronted by the increasing commercial value of information, especially personal information that can be used commercially in ways that compromise citizens' privacy. Another issue is whether access fees for electronic information should be based on the cost of providing the access, or on the market value of the information.

This paper briefly summarizes major trends and emergent issues related to commercial access to public records, including cost recovery models and privacy protections. The purpose of this overview is to help the Governor's Work Group on Commercial Access to Government Records identify issues and policy alternatives.¹

I. Policies to Recover Costs from Commercial Use of Public Records: Qualifying Users

The federal government and certain states have policies based on ~~the~~ *identity of the requester* of the information, or the *intended use* of the information. In some cases, these policies are designed to protect citizen privacy from intrusive commercial uses of public records, such as direct marketing (see *Section III below*). In other cases, the policies are to make commercial users pay more for access to public records than other requesters, on the grounds that the public resource of information should not be used to subsidize businesses, or simply to retain for the public some of the commercial value of the information.

The federal **Freedom of Information Act (FOIA)** establishes a fee schedule that distinguishes between the media, educators and researchers (who pay the cost of duplication only) and commercial requesters (who pay additional search and review fees³). These provisions have not been challenged. However, at least one court has suggested that because commercial/non-commercial distinctions work to limit access to public data to commercial vendors, they raise potential First Amendment concerns⁴.

A recent survey by the National Conference of State Legislatures (NCSL) found that a number of states are using this type of fee schedule to raise revenue from commercial requests for electronic information.

¹ Statutory references for states cited *AK Stat. 09.25.100 et seq.*; *AZ Rev. Stat. Ann. 39-121*; *CA Gov't Code 6250*; *CA Ann. Codes 1796*; *FL Stat. 119.011 et seq.*; *GA Code Ann. 50-18-70 and 50-25*; *HI Rev. Stat. 92F*; *ID Code 9-301, 9-338 and 9-340*; *IN Code 5-14-3 and 5-21*; *KS Stat. Ann. 74-9301*; *KY Rev. Stat. Ann. 61.870 et seq.*; *LA Rev. Stat. Ann. 44.1 et seq. and 90 LA Op. Att'y Gen. 330 (1990)*; *Minn. Stat. Ann. 13.01 et seq.*; *NE Rev. Stat. 84-712 and 84-713*; *NM Stat. Ann. 14-2-1 et seq.*; *NY Pub. Off. 84, 87 and 92*; *NC Gen. Stat. 132*; *OH Rev. Code Ann. 149.43*; *OK Stat. 51-24A*; *OR Rev. Stat. 192.445*; *RI Gen. Laws 38-2*; *SD Cod. Laws Ann. 1-27-1*; *TN Code Ann. 10-7-503 et seq.*; *VA Code Ann. 2.1-341 et seq.*; *RCW 42.17.260(9)*; *WI Stat. Ann. 19.62 et seq.*

² 5 U.S.C.A. Sec. 552

³ House Committee on Government Operations. "A Citizen Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records." H.R. REP. No. 103-104, 103d Cong., 1st Sess. 9 (1993).

⁴ *Legi-Tech v. Keiper* 766 F. 2d 728 (2d Cir. 1985).

⁵ Anneliese May.. DRAFT: "Access to Electronic Public Information: A Summary of Current Trends." National Conference of State Legislatures (NCSL), July 1996

According to NCSL, seven states currently make such a distinction between commercial and non-commercial requests **Arizona, Idaho, Indiana, Kentucky, Minnesota, Oklahoma and Tennessee**

Another approach taken by many states is to withhold valuable software and databases from commercial users, often by removing “software” from the definition of public record, or by allowing agencies to copyright software they have developed with public funds. According to NCSL, 20 states have statutory provisions that exempt software in some way, and the attorneys general of Michigan, Mississippi and Nevada have issued opinions exempting government-developed software. **Kentucky** and certain local governments in **North Carolina** have laws allowing them to withhold public geographic information systems from commercial requesters. On the other hand **Alaska** and **Kentucky** specifically include software in their statutory definition of “public record.”

In some cases, the distinction is used to give lower-cost access to public information that is to be used for a public purpose such as research or education. **Alaska**, for example, allows a fee for electronic services or products to be waived if the service or product is to be used for a public purpose such as research or education.

Other states have a policy of prohibiting higher fees for commercial users. Some opponents to differential fees for commercial users argue that commercial users, as taxpaying members of the public, are already entitled to public information. Another argument against this practice is that it is difficult to verify the identity of a requester and that it can potentially be abused and have a chilling effect on public access. **North Carolina** and **Ohio** statutes specifically prohibit inquiry into a requester’s intended use of public information.

II. “Enhanced Access”: Cost Recovery Trends in Access to Electronic Public Records

A growing number of states are basing cost-recovery fee schedules on a distinction based ~~type~~ *type of service* as opposed to type of requester or intended use. This type of distinction can be used in effect to charge commercial users at a higher rate, without the difficulty of verifying identity or motive. For example, a state could set higher fees for high-volume record requests, on the assumption that the high volume signals commercial intent, and yet retain the authority to waive the higher fee for requests intended for public purposes such as journalism or research.

Some states are treating “enhanced” electronic access (such as dedicated access lines, search capabilities for public databases, or customized records) as a source of revenue to recoup the cost of developing information systems or to support other government functions. Typically, states that offer enhanced electronic access for a fee also offer a certain amount of no-cost or nominal-cost electronic information. However, in some cases virtually all electronic access to public records is treated as an “enhanced” service and is made available only for a fee. Other states view fees as a barrier to public access, and choose not to offer enhanced fee-based electronic services. **Florida**, for example, statute allows agencies to recover costs from record requests, but prohibits agencies from entering into contracts to sell access to public records.

A few examples will illustrate the range of states’ current policies for balancing cost recovery with public access. **Alaska** allows agencies to charge a fee for electronic services and products to recover actual costs, including a “reasonable portion” of development and maintenance. However, no-cost access public access must be provided to the same data via a public terminal. **Washington State’s** Public Information Task

Force resulted in amendments to statute to require various agencies to consider cost and other barriers to public access in designing their electronic information systems, and to keep the information as accessible as possible. This legislation also directs agencies not to “offer customized electronic access services as the primary way of responding to requests or as a primary source of revenue.”⁶ In the interests of public access, **Florida** recently changed a mandatory electronic transaction charge to a discretionary one. **Minnesota’s** Government Data Practices Act has been amended in recent years to allow a “reasonable fee,” based on actual development costs, for government databases and software which are commercially valuable and were developed with public funds. **Indianapolis** provides most of its electronic applications free of charge to residents and businesses, but “dynamic” applications (i.e., ones needing frequent updating) are available only to fee-paying subscribers. **Georgia** passed a law in 1993 that allows charging for electronic access to most public information; these charges ~~are~~^{not} limited to recovering costs.

Fees for electronic access can be controversial. **Nebraska** the state legislature intervened in a contract between an agency and a private firm to offer fee-based electronic access in a program that began as a free pilot service. In at least one state **Louisiana** the attorney general has issued an opinion that fees for copies should reflect only the expense of generating the information, not its commercial value.

However, a growing trend among states is to get into the business of fee-based public information services, typically through a public corporation such as **New Mexico’s** TechNet or **Georgia’s** GeorgiaNet, or through a contract with a private firm such as **Nebraska’s** Nebrask@ Online. In Georgia, it has been clarified after some concern arose that the state cannot sell records per se, but only enhanced access to records. In most cases, these entities provide a mixture of fee-based enhanced services and free (or nominal cost) basic public information.

III. Privacy in the Context of Commercial Use of Electronic Public Records

Some states prohibit certain commercial uses of restricted public records containing personally identifiable information, when commercial use might intrude on the privacy of citizens. **Washington** as well as **New York, Rhode Island, Indiana** and **South Dakota** have statutory provisions that refuse lists of names or other personal information if sought for a commercial purpose.⁷ **Kansas** requires information requesters to agree not to use personal information from public records to conduct direct-sales marketing. **Georgia** briefly prohibited *all* commercial use of public records with a law passed in 1992 and repealed the following year.⁸ **California** amended its public records law in 1994 to exempt voters’ home address, phone number and occupation from release to the public, although journalists and researchers can still access this information. This approach has some momentum on the federal level as well. The federal **Drivers’ Privacy Protection Act of 1994**⁹ which takes effect in 1997, prohibits states from releasing personal information from drivers’ registration databases to the general public, but permits access for certain uses to businesses.

Another approach to protecting citizens’ privacy is a “fair information practices” policy that provides citizens the opportunity to review and correct any public record that contains personal information about them. Fair information practices laws can be quite comprehensive, embracing eight basic principles: openness, individual participation, limited collection, data quality, limited use, limited disclosure, security

⁶ Chapter 171, Laws of 1996.

⁷ NCSL page 8

⁸ Joint Committee on Information Technology Resources (Florida), “Electronic Records Access: Problems and Issues” (January 1994).

⁹ 18 U.S.C.A. Sec. 2721

and accountability. The federal **Privacy Act of 1974**¹⁰ provides a process for citizens to view records pertaining to them and to request amendment of inaccuracies. The Privacy Act also places restrictions on the use and disclosure of personal information (for example, information collected for one purpose may not be used for another without notifying and obtaining consent from the subject of the record), and requires federal agencies to keep records of the date, nature and purpose of certain disclosures of personal information. Congress has also considered legislation to establish a Privacy Commission for the purpose of studying information systems.

A number of states including **Virginia New York Hawaii** and **California** have fair information practices laws. **Washington's** Public Electronic Access law contains several provisions for information practices and data protection: agencies are directed to ensure the accuracy of personal information to the extent possible, and to establish mechanisms for citizens to review and request correction to information about them contained in public records. **Wisconsin** created a Privacy Council and a Privacy Advocate to recommend state and local privacy protection policies¹¹. **Oregon** recently amended its public records law to provide a process for citizens to prevent disclosure of their home address and telephone number, if disclosure would endanger their or their family's personal safety.

¹⁰ 5 U.S.C.A. Sec. 552a

¹¹ Joint Committee (Florida), page 139.